United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 23, 2007

TO : Celeste Mattina, Regional Director

Region 2

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: ABC, Inc. 530-6050-01408

Cases 2-CA-37923 and 2-CA-37948 530-6050-0140

530-6067-6001-4500

These Section 8(a)(5) cases were submitted for advice regarding whether, during negotiations for a successor collective bargaining agreement, the Employer:

- (1) insisted to impasse on permissive bargaining subjects;
- (2) unlawfully refused to provide information to the Union relevant to evaluating the proposals alleged to be permissive bargaining subjects; and
 - (3) engaged in unlawful surface bargaining.

We conclude that the Employer:

- (1) unlawfully insisted to impasse on proposals that constituted permissive bargaining subjects under the standard set forth in Antelope Valley Press¹;
- (2) did not unlawfully refuse to provide information to the Union relevant to evaluating the proposals alleged to be permissive bargaining subjects, because the duty to provide information is coextensive with the duty to bargain about mandatory subjects; and
 - (3) did not engage in unlawful surface bargaining.

FACTS

ABC, Inc. (Employer) and the Writers Guild of America, East (Union) have had a collective bargaining relationship for the past 50 years. The parties' 2005-2006 negotiations concerned the successor to the National Agreement (NA). The instant case involves a proposal package known as the

¹ 311 NLRB 459, 461 (1993).

producer proposals. The producer proposals primarily affect a unit of employees under the NA, the New York News Writers working in TV. In addition, one of the Employer's producer proposals affects employees working under a separate collective-bargaining agreement, the Minimum Basic Agreement (MBA).

1. The National Agreement (NA)

The parties' most recent NA was effective from February 1, 2002 through January 31, 2005. The NA covers staff news writers and other employees working in New York City and Washington, D.C. The NA consists of a main agreement, sideletters, and appendices.

The NA's unit-recognition provisions in the main agreement cover certain specified units, including "NY News Writers." The unit-recognition provisions do not define which employees are in each of the units or the work performed. That definition is supplied in a specific appendix for each unit. These appendices define each of the units in terms of the work performed, and set forth terms and conditions of employment specific to each unit that supplement the NA's general provisions.

News Writers Unit Defined in Terms of Work Performed

The unit at issue in the instant cases is the New York News Writers. The NA's Appendix B defines the news writer unit in terms of the work performed; it provides that any New York staff employee who regularly writes is a news writer, regardless of what other titles the Employer gives the employee. Appendix B also excludes statutory supervisors from the unit.

The NA permits the Employer to assign news writers covered by the NA to serve as show, segment, or special project producers, and employees who are part of the news writer unit often serve as producers. The NA also permits the Employer to negotiate personal service contracts with individual news writers to compensate them for performing these additional producer duties; the compensation that the news writers receive supplements their contractually-provided writing pay.

The Region has found that most producer work historically has been bargaining unit work covered under the NA. The evidence shows that producers are primarily writers; their work assignments include writing, as defined by the NA, and they perform such tasks anywhere from 33 to 90 percent of the time. Based on the definition of news writers under the NA, the producers are bargaining unit

employees under the NA; their writing work brings them within the News Writer unit, as defined by Appendix B. Some producer jobs, however, are specifically excluded from the unit; these positions are listed in Sideletter G.

Exclusions to the Units - Sideletter G

One of several sideletters to the NA, Sideletter G, excludes from the bargaining unit all individuals working in certain job titles who might otherwise be covered by the NA because they perform writing tasks, including News Director, Bureau Chief, Managing Editors, and Executive and Senior Producers (for their own programs). When the Union first agreed to Sideletter G in 1987, the Sideletter's operation did not cause the removal of any unit positions as the NA had never covered any of the specified positions.

2. Minimum Basic Agreement

The Employer and the Union are also parties to a multi-employer agreement, the Minimum Basic Agreement (MBA), 2 along with Writers Guild of America-West. The parties have always treated television magazine show producers as writers under the MBA, rather than the NA. 3 ABC employs between 60 and 120 MBA-covered television magazine show writers/producers.

Under the parties' agreements, no employee is covered by more than one collective bargaining agreement, and no producer excluded from NA coverage is covered by the MBA.

3. The Parties' 2005-2006 Negotiations

Between January 2005 and November 2006, the Union and the Employer bargained for a successor to the NA covering

² The agreement is also known as the Theatrical and Television Basic Agreement, and is effective November 1, 2004 through October 31, 2007.

³ The MBA's recognition clause includes "all writers engaged by the Company as freelance employees (as distinguished from writers on staff) for the purpose of preparing literary material as employees for news, documentary or public affairs programs" There are no "staff" television magazine show producers. About 5 or 6 staff news writers write linking segments for some news magazine shows, but those employees, being staff employees who perform writing tasks, fall under the NA's news writer unit, and do not fall under the MBA.

television and radio staff personnel involved in producing regular news shows in Washington, D.C. and New York. The Employer proposed throughout negotiations to change existing contractual provisions regarding New York staff news writers/producers covered by the NA, as well as freelance network TV magazine show producers covered by the MBA. Indeed, in 16 of the parties' 24 bargaining sessions, the producer proposals (known as C.9, 11, 19, 10) were a key part of bargaining. The Union strongly resisted these proposals.

The Employer's First Producer Proposals

The Employer first proposed to exclude 10 of the producers then covered by the NA from the coverage of that agreement, and to exclude network television magazine show producers from the MBA. Thus, at the outset of the negotiations, in January 2005, the Employer proposed to offer the 10 NA-covered producers at issue the option to work as producers on a non-covered basis. If an employee accepted the offer, the Employer would negotiate a personal service agreement with the employee directly. If an employee declined the offer, that employee would remain in the news writer unit, but the employee would no longer perform producing duties. The Employer's proposals provided for buyouts and severance payments if the Employer determined there was insufficient work for the news writers who chose to remain working under the NA.

In particular, Proposal C.9 would "[a]mend Sideletter G of Article XXIII to permit the following additional and substituted individuals to write and/or edit material on a non-WGA covered basis." It listed several job titles that would be added to that Sideletter. Under Proposal C.9, the titles listed in C.9 would simply be added to Sideletter G, without any further change in the language of that Sideletter, thus authorizing those employees in the listed positions to be employed in otherwise-covered writing jobs without being covered by the NA.

Proposal C.11 would permit the 10 news writers/ producers to "perform any or all of the duties of WGA-represented news writers . . . without being covered by the Agreement." Due to the news writers' unit description of news writers being those who regularly write, those who performed the work of news writers would otherwise be included in the bargaining unit, unless they were statutory supervisors.

Proposal C.19 included a procedure for removing news writers/producers from the unit, and a layoff procedure and

severance provisions for those who choose to remain in the news writer unit, but for whom the Employer determines there is not enough work.

Finally, Proposal C.10 provided that Network Television magazine show producers may write and edit material for broadcast and shall not be covered by the National Agreement. This proposal would not effect any change in the status of the Network Television magazine show producers under the NA, as they have never been covered under the NA. Rather, it would solely serve to exclude these employees from the coverage of the MBA because, as discussed above, producers expressly excluded from coverage under the NA are thereby also excluded from coverage by the MBA.

On October 27, 2005, the Union filed charges alleging that the producer proposals constituted permissive subjects of bargaining, that the Employer unlawfully insisted on the producer proposals as a condition of reaching an overall agreement, and that the Employer failed to provide necessary information relevant to the producer proposals. In September 2006, the Region granted the Union's request to withdraw these charges.

The Employer's June 16, 2006 producer proposals

By letter dated June 16, 2006, 5 the Employer withdrew its existing producer proposals and presented revised Proposals C.9, C.11, and C.19.6 These proposals would allow

⁴ In <u>ABC, Inc.</u>, Cases 2-CA-37150, et al., Advice Memorandum dated August 25, 2006, we concluded that the Union's unfair labor practice charges should be dismissed, absent withdrawal. This determination was based on the lack of evidence at that time that the Employer had conditioned agreement on the allegedly permissive proposals or that the parties had reached impasse -- the Employer had withdrawn the initial set of producer proposals and had presented a new set of proposals by that time. We also concluded that there was insufficient evidence that the Employer had unlawfully refused to provide information that related to the producer proposals as it had not been shown that the Employer had failed to bargain over an accommodation as to the alleged confidentiality of the information sought.

⁵ All dates hereinafter are in 2006, unless otherwise noted.

⁶ The Employer also proposed a minor change to Proposal C.10, but the parties agree that this proposal remained unchanged in all significant respects.

individuals in eight new non-unit positions, termed supervisors, to perform writing duties without being covered by the NA, would permit the Employer to offer the new positions to the news writers/producers, and would permit the Employer to offer buyouts/severance payments to those news writers who might be laid off if they did not accept the new positions.

In particular, the revised Proposal C.9 provides for adding eight new titles to Sideletter G's list of employees that could write and edit without being in the bargaining unit, including "seven (7) weekday Supervising Show Producers and one (1) weekday Supervising Sports Producer."

The revised Proposal C. 11 would add a new sideletter providing for the promotion of staff news writers to the eight new non-unit producer positions; these new positions would perform the duties of existing unit news writers and perform additional supervisory duties. The proposal specified the procedure to be followed for filling the new positions: (1) the Employer would offer current writers/producers the positions; (2) if an employee accepted a promotion, that employee would be removed from the bargaining unit; and (3) if that employee did not accept, the employee would remain in a unit news writing position, without producing duties, and would earn the base contractual writing pay. The proposal included descriptions of the duties that the Employer stated it would assign to the newly created positions that would ensure that those holding the positions would be statutory supervisors. Among the planned duties of the new positions would be the evaluation of temporary news writers for continued employment or promotion, the imposition or recommendation of discipline for news writers, and participation on behalf of the Employer in grievances, personnel matters, and collective bargaining. The proposal did not, however, state that employees in the new positions would be within the unit and covered by the NA if the positions did not, in fact, turn out to be supervisory.

The revised Proposal C.19 would add a new sideletter setting forth the layoff and severance provisions for news writers who did not accept the new non-unit positions pursuant to revised Proposals C.9 and C.11.

On October 11 and October 25, the Union filed the charges in the instant cases, again alleging that the producer proposals constituted permissive subjects of bargaining, that the Employer unlawfully insisted on the producer proposals as a condition of reaching an overall agreement, and that the Employer failed to provide necessary information relevant to these proposals. The

Employer claims that the producer proposals are mandatory subjects of bargaining, as they concern work assignment, and that it is not required to provide the requested information to the Union as it concerns non-unit employees and is confidential.

On November 29, the parties had their last bargaining session.

ACTION

We conclude that the Employer:

- (1) unlawfully insisted to impasse on proposals that constituted permissive bargaining subjects under the standard set forth in Antelope Valley Press⁷;
- (2) did not unlawfully refuse to provide information to the Union relevant to evaluating the proposals alleged to be permissive bargaining subjects, because the duty to provide information is coextensive with the duty to bargain about mandatory subjects; and
 - (3) did not engage in unlawful surface bargaining.

I. The Producer Proposals Constituted Permissive Subjects of Bargaining, and the Employer Insisted to Impasse Over Them.

Section 8(a)(5) prohibits either party from conditioning agreement to a collective-bargaining agreement on the other party's acceptance of a proposal on a permissive subject of bargaining. Thus, although parties may voluntarily and lawfully discuss and agree to permissive subjects, a party may not "posit the matter as an ultimatum." A party may not set forth agreement on the permissive subject as a prerequisite or condition of agreement on mandatory subjects, because to do so is "in substance, a refusal to bargain about the subjects that are

8 See NLRB v. Borg-Warner Corp., 356 U.S. 342, 349 (1958);
KCET-TV, 312 NLRB 15 (1993).

 $^{^7}$ 311 NLRB at 461.

⁹ See Bridon Cordage, 329 NLRB 258, 264 (1999).

¹⁰ Longshoremen ILA v. NLRB, 277 F.2d 681, 683 (D.C. Cir.
1960) (quoting NLRB v. Borg-Warner Corp., 356 U.S. at 349).

within the scope of mandatory bargaining."¹¹ For this reason, it is unlawful to insist to impasse on a permissive subject of bargaining.¹²

A. The Producer Proposals C.9, C.11, and C.19 Constituted Permissive Subjects

It is well established that "unit scope is not a mandatory subject of bargaining," 13 nor is "the composition of the bargaining unit." 14 Otherwise "an employer could use its bargaining power to restrict (or extend) the scope of union representation . . ." 15 It is difficult for parties to "bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining." 16 Thus, a party to a collective-bargaining agreement may propose to bargain over the scope of the unit, but it may not insist to impasse on that subject. 17

Detroit Newspapers, 327 NLRB 799, 800 (1999), enf. denied on other grounds, 216 F.3d 109 (D.C. Cir. 2000). See also Taft Broadcasting Co., 274 NLRB 260, 261 (1985) ("in evaluating whether parties have insisted to impasse on a particular non-mandatory subject of bargaining, the Board [has] looked to whether agreement on the mandatory subjects of bargaining are conditioned on agreement on the non-mandatory subject of bargaining"); Don Lee Distributor, Inc., 322 NLRB 470, 471 (1996), enfd. 145 F.3d 834 (6th Cir. 1998), cert. denied, 525 U.S. 1102 (1999); Walnut Creek Honda, 316 NLRB 139, 139 n.1, 141-142 (1995), enfd. 89 F.3d 645 (9th Cir. 1996); Westvaco Corp., 289 NLRB 301 (1988).

Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971). See Detroit Newspapers, 327 NLRB at 800 (citing NLRB v. Borg-Warner Corp., 356 U.S. at 349 (statutory duty to bargain in good faith extends only to wages, hours, and other terms and conditions of employment)).

¹³ Bozzuto's, Inc., 277 NLRB 977, 977 (1985).

¹⁴ Newspaper Printing Corp. v. NLRB, 625 F.2d 956, 964-965
(10th Cir. 1980), cert. denied, 450 U.S. 911 (1981), quoted
in SFX Target Center Arena Mgmt, LLC, 342 NLRB 725, 735
(2004).

^{15 &}lt;u>Idaho Statesmen v. NLRB</u>, 836 F.2d 1396 (D.C. Cir. 1988).

¹⁶ Douds v. ILA, 241 F.2d 278, 282 (2d Cir. 1957).

Taft Broadcasting Co., 274 NLRB at 261 ("Parties are free to set forth proposals concerning non-mandatory subjects of

On the other hand, the assignment of unit work is a mandatory subject that may be insisted upon to impasse, even if the work assignment at issue is to employees outside of the bargaining unit; even such out-of-unit assignment of work directly affects the bargaining unit's terms and conditions of employment by reducing the amount of unit work. Thus, the assignment of unit work to statutory supervisors or the reclassification of unit positions as supervisory constitutes mandatory bargaining subjects. 19

To resolve the difficult unit scope/work assignment distinctions that arise when a bargaining unit is defined at least in part by the work the employees perform, the Board articulated the test in Antelope Valley. This test provides that, where unit/jurisdictional clauses define the bargaining unit in terms of work performed, an employer may insist to impasse on a proposal to reassign such work to employees outside the unit, even though the proposal would seem to alter the scope of the bargaining unit, as long as the proposal would not bar the union from contending that the employees to whom the work is transferred should be

bargaining, but may not insist on those proposals to impasse"). Cf. <u>Grosvenor Resort</u>, 336 NLRB 613, 616-617 (2001) (employer unlawfully declared impasse after declaring that it was presenting its last offer, which included a change in unit scope).

- 18 See, e.g., Antelope Valley Press, 311 NLRB at 460; Bridgeport & Port Jefferson Steamboat Co., 313 NLRB 542, 545 (1993); Storer Communications, 295 NLRB 72, 77-79 (1989), enfd. 904 F.2d 47 (D.C. Cir. 1990) (employer's proposal concerned a mandatory subject when it proposed a change in what union-represented employees did, a work assignment question, rather than whom the union represented, a unit scope question).
- Regal Cinemas, Inc., 334 NLRB 304 (2001), enfd. 317 F.3d 300 (D.C. Cir. 2003); Park Manor Nursing Home, 312 NLRB 763, 767 (1993) (employer proposal to reassign unit work to supervisors and other non-unit personnel is a mandatory subject).
- 20 311 NLRB at 461. See also <u>Chicago Tribune</u>, 318 NLRB 920, 924 (1995) (<u>Antelope Valley's "new test abandons attempts</u> to characterize a disputed proposal of this type as relating exclusively either to unit scope or to work assignments, but not to both").

included in the unit. 21 Thus, the question under the first prong of the test is whether the proposal in question seeks to change the actual unit description. 22 If so, the proposal would alter the scope of the bargaining unit, and it would be a permissive subject of bargaining. 23

If the proposal does not seek to alter the actual unit description, the question under the second prong of the Antelope Valley test is whether the proposal "attempt[s] to deprive the union of the right to contend that the persons performing the work after the transfer are to be included in the unit." If so, the proposal likewise would alter the scope of the bargaining unit, and it would be a permissive subject of bargaining.

In the instant cases, we agree with the Region that the Employer's revised Proposals C.9, C.11, and C.19 are permissive subjects under the Antelope Valley test. 25 First, these proposals expressly seek to change the definition or scope of the unit. Under the existing NA, the identity of bargaining unit employees is defined by the work performed, with certain limited specific exceptions. The existing contractual unit description includes three parts: the Article I recognition clause, which names the units that the Union represents, the Appendix B unit description, which defines the news writer unit in terms of the work performed, and Sideletter G, which explicitly excludes certain named job positions from the news writer unit. Although the Employer did not seek to explicitly alter either the recognition clause or the news writer unit definition per se, the Employer's proposals to specifically exclude more positions from the unit expressly alters the unit description and therefore is prohibited under Antelope Valley's first prong.

Moreover, even if the proposals were read as not altering the actual unit description, the Employer's proposals are still permissive under the second prong of

²¹ Antelope Valley, 311 NLRB at 462.

²² <u>Id</u>., 311 NLRB at 461.

²³ Ibid.

²⁴ Ibid.

²⁵ As the Employer withdrew its initial Proposals C.9, C.11, and C.19 prior to impasse, we need not determine whether the Employer's earlier proposals were permissive subjects of bargaining.

the <u>Antelope Valley</u> test, as amending Sideletter G to permit those in the new positions to "write and/or edit material on a non-WGA covered basis" would preclude the Union from ever claiming the positions to be part of the bargaining unit. Thus, as the positions are expressly excluded from the coverage of the Union and the NA regardless of the work they actually perform, the Union could not claim in any later proceeding that the individuals in the listed positions should be in the unit, even if those who hold these positions continue to perform unit work. In this regard, it is particularly significant that the proposals did not state that employees in the new positions would be within the unit and covered by the NA if the positions did not, in fact, turn out to be supervisory.

This is in sharp contrast with Antelope Valley itself, where the Board found the employer's proposal to transfer work outside the bargaining unit to be a mandatory bargaining subject because the employer's proposal did not alter the unit description and the union was not foreclosed from seeking to represent the employees at any time in the future.²⁷ Indeed, in this regard, the facts of the instant

²⁶ See also <u>Taylor Warehouse Corp. v. NLRB</u>, 98 F.3d 892, 902 (6th Cir. 1996); <u>Greensburg Coca-Cola Bottling Co.</u>, 311 NLRB 1022, 1023-1024 (1993), enf. denied, 40 F.3d 669 (3d Cir. 1994) (employer's proposal constituted a change in unit scope and thus a permissive subject when it would exclude part time employees and grant to the employer the exclusive right to determine part-time employees' terms and conditions of employment in a context where the employer controlled the number of hours that employees worked and where the union represented all regularly employed employees, including part-time employees).

²⁷ Similarly, in Batavia Newspapers Corp., an employer's reassignment proposal was a mandatory subject even though its potential effect would be to eliminate unit work. Batavia Newspapers Corp., 311 NLRB 477, 480 (1993) (citing Storer Communications, 295 NLRB at 78 (the change to the existing jurisdiction clause "did not involve who [the union] represents but rather what these employees do) (emphasis in original)). The proposal did not "preclude the Union from contending in unit clarification or other Broad proceedings that the individuals who perform the transferred unit work assignments are to be included in the unit." 311 NLRB at 480. The Board explained that the proposal to reassign unit work affected only what work the unit employees performed, not who the union represented. Id. Cf. Chicago Tribune, 318 NLRB 920, 924 (1995) (employer proposal was mandatory when it did not alter the unit description, and the proposed zipper clause did not

cases are closer to those in Bremerton Sun Publishing Co., 28 where the Board found that the employer unlawfully insisted to impasse on a proposal to delete the unit description and to reassign work to non-unit employees. The employer's proposal there would have deleted that part of the contractual unit description that stated that the unit consisted of all employees performing unit work, which was the work within the union's jurisdiction. Specifically, the employer sought to reserve the right to determine how much work within the union's jurisdiction unit employees would perform and to reserve the right to assign union jurisdictional work to non-unit employees. The Board concluded that the employer proposal sought not merely a work assignment provision, but to have "no meaningful unit definition at all in the collective-bargaining agreement."29 In effect, as here, the employer insisted to impasse on a proposal to amend the unit description. 30

The Employer argues that its Proposals C.9, C.11, and C.19 are mandatory pursuant to the Board's decision in Bridgeport & Port Jefferson Steamboat Co. 31 In Bridgeport & Port Jefferson Steamboat, the employer lawfully insisted to impasse on a proposal to add supervisory duties to certain bargaining unit positions. In that case, the union represented certain employees, including captains. The Regional Director, affirmed by the Board, initially dismissed a unit clarification petition in which the Employer, after assigning new supervisory duties to captains, sought to exclude the captains from the unit. This dismissal was based on a conclusion that the newlyconferred duties were insufficient to demonstrate Section 2(11) status.³² During bargaining for a successor contract, the employer proposed to add bona fide supervisory duties to the captains' job description. Upon reaching impasse, the employer implemented that proposal. The Board majority found that the employer had shown that the bargaining proposals in fact conferred supervisory authority on

constitute a waiver of union's right to contend that the employees to whom the work was transferred should be in the unit).

²⁸ 311 NLRB 467, 470-471 (1993).

²⁹ Id., 311 NLRB at 470.

 $^{^{30}}$ Id., 311 NLRB at 471.

^{31 313} NLRB at 544-546.

 $^{^{32}}$ <u>Id.</u>, 313 NLRB at 545-546.

captains to improve its operations, thereby excluding the captains from the unit, and that the employer lawfully insisted on this proposal to impasse.³³

Significantly, the bargaining unit in <u>Bridgeport & Port Jefferson Steamboat</u> was not defined in terms of the work performed by unit employees, and the unit description excluded statutory supervisors as a class; the unit description did not also exclude a list of particular job titles regardless of whether they actually constituted supervisory positions.³⁴ In addition, the employer's proposal there would not preclude the union from claiming in a later proceeding that the captains should be in the unit if they were not performing supervisory work.

In contrast, the bargaining unit in the instant cases is defined by the news writer/producer work covered employees perform, so that anyone who "regularly writes" is a news writer and a member of the bargaining unit, unless specifically excluded by Sideletter G's terms. Moreover, the proposed positions would be excluded from the unit even if they were not supervisory. Finally, although the Employer asserts that its producer proposals do not explicitly preclude the Union from filing a grievance or UC petition, the content of the proposals themselves preclude the success of any such action.

Applying Antelope Valley here, the proper question is whether the Union could still claim that the employees to whom work might be assigned pursuant to the proposal should be considered members of the bargaining unit.36 The Board stated there that it "read the Respondent's proposal as merely indicating that the Respondent would be able to assign specified unit work to individuals who were not previously members of the unit."37 In contrast, the

³³ Member Devaney dissented, in agreement with the administrative law judge, because of the Board's finding in the earlier representation case.

^{34 &}lt;u>Bridgeport & Port Jefferson Steamboat</u> did not cite Antelope Valley.

 $^{^{35}}$ Such positions would be excluded from the unit in addition to those who are to be excluded, as Appendix B has expressly provided, on the basis of being statutory supervisors.

³⁶ See Antelope Valley, 311 NLRB at 461-462.

 $^{^{37}}$ Id., 311 NLRB at 462.

Employer here seeks to have current bargaining unit members no longer be considered members of the bargaining unit regardless of whether they are Section 2(11) supervisors. Indeed, the Employer stated that it was "imperative" that these eight producers be removed from the unit. Thus, under the proposals, if the Union were ever to assert that these producers are unit employees because they write, Sideletter G's terms would show that the Union had agreed to exclude these producers from the unit and from the NA's coverage even if they were not supervisors.

The Employer has recently asserted that, under its interpretation of its proposal, those holding the titles proposed as Sideletter G additions would be statutory supervisors and , if they were not statutory supervisors, the Union could succeed in any grievance or unit clarification proceeding to have those holding those positions included in the unit. The Employer's actual contractual proposals, however, do not by their terms convey such an understanding, and the Employer did not make clear during bargaining that Sideletter G would operate to exclude only those in the listed positions who were statutory supervisors. Thus, the Employer never asserted in bargaining or otherwise informed the Union that an employee in one of listed positions who was not actually a supervisor would remain in the unit. Rather, the Employer at all times made clear that Sideletter G's amendment would operate simply to remove the positions listed from the unit. Under the proposals as offered during bargaining, any staff employee who regularly writes, but who holds a title added to Sideletter G, would be excluded from the unit, without regard to whether the employee is properly classified as a statutory supervisor. Thus, the Employer's current stated interpretation of its proposal does not reflect what the Employer conveyed to the Union during bargaining. Therefore, while this asserted current interpretation might provide some lawful basis for the Employer to modify its proposals in settlement of this matter, it does not negate the unlawfulness of the bargaining proposals previously offered to the Union. 38

³⁸ See <u>Bremerton Sun</u>, 311 NLRB at 470, 474 (employer's contention, raised during Board proceeding, that it understood that the parties' supplemental agreement would rescind a unit description, was not supported by any evidence that showed that the employer's understanding of the contract's meaning was communicated to the union during bargaining and did not represent a mutual understanding of the parties).

For these reasons, we agree with the Region that Proposals C.9, C.11, and C.19 constitute permissive bargaining subjects.

B. Proposal C.10 Also Constituted a Permissive Bargaining Subject

It is well settled that matters that pertain to employees outside the bargaining unit constitute permissive subjects of bargaining.³⁹ Here, Proposal C.10 solely affects freelance writers working under the MBA -- employees in a different bargaining unit. Therefore, we agree with the Region that it is a permissive subject of bargaining.

Specifically, Proposal C.10 would cause the exclusion of magazine show producers from the MBA bargaining unit. Magazine show producers are freelance employees who are covered by the MBA when they perform writing tasks in addition to producing work; the parties have always treated them as writers solely covered by the MBA, and not covered by the NA. Under the MBA, no employee is covered by more than one of the collective bargaining agreements, and no one who is excluded from the NA is covered by the MBA. Thus, if the Union were to agree to Proposal C.10 to amend the NA to permit the magazine show producers to write without being covered by the NA, the magazine show producers would no longer be covered by the MBA, despite the fact that they would otherwise come within the definition of "writer" in the MBA.

The Employer argues that C.10 concerns merely the assignment of NA bargaining unit work to other employees. This argument fails, however, as the proposal does not in fact address NA work assignment at all -- the parties have always treated magazine show producers as writers solely covered by the MBA, and not covered by the NA at all.⁴⁰ Nor was the language of proposal C.10 necessary in order to allow magazine show producers to take over any of the writing of linking segments for the news magazine shows -- there was no need to state that the producers "shall not be covered by the National Agreement" because, as free-lance

 $^{^{39}}$ Carpenters Local 33 (Curry Woodworking, Inc.), 316 NLRB 367, 370 (1995). See NLRB v. Borg-Warner Corp., 356 U.S. at 349-350.

⁴⁰ As to the 5 or 6 staff news writers, who are covered under the NA, and who write linking segments for the news magazine shows, Proposal C.10 would not apply to them as they are not magazine show producers.

employees, they cannot be covered by the NA. Rather, the sole effect of Proposal C.10 would be to exclude the magazine show producers from the coverage of the MBA, a subject that involves an entirely different bargaining unit from the NA. During bargaining, the Employer made clear that by amending the NA to permit an MBA-covered free lance writer/producer to perform news writer tasks without being covered by the NA, it intended to exclude that free lance writer/producer from coverage by the MBA as well. 41 Therefore, as Proposal C.10 solely affects employees outside the scope of the NA, we agree with the Region that it also is a permissive subject of bargaining. 42 In sum, Proposals C.9, C.11, C.19, and C.10 constitute permissive bargaining subjects. We must therefore determine whether the Employer unlawfully insisted to impasse on their inclusion in the new collective-bargaining agreement.

C. The Employer Unlawfully Insisted to Impasse on the Permissive Producer Proposals

Impasse occurs when "good faith negotiations have exhausted the prospects of concluding an agreement." As the Board has explained, "impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their best efforts to achieve agreement with respect to such, neither

⁴¹ As the Employer's representative stated during bargaining, referring to its earlier MBA negotiations, "there was a provision agreed to in the event that any staff agreement [such as the NA] has a provision [that] agreed to that . . . [reading from the MBA recognition clause:] 'nor does this agreement cover any services performed by . . . individuals when such individuals are permitted to perform writing services without being covered by such other collective bargaining agreements pursuant to an exclusion in such other collective bargaining agreements. . . ' That agreement said if I can negotiate those people can write in my staff agreements, the other agreement follows."

⁴² Of course, if C.10 were intended to apply to NA bargaining unit employees, and to exclude specific job titles from NA coverage, it would suffer from the same infirmities as the Employer's C.9, C.11 proposals, and would likewise be a permissive bargaining subject for that reason.

^{43 &}lt;u>Taft Broadcasting Co.</u>, 163 NLRB 475, 478 (1967), enfd. sub nom. <u>AFTRA v. NLRB</u>, 395 F.2d 622 (D.C. Cir. 1968).

party is willing to move from its respective position."⁴⁴ The factors that the Board considers in determining whether impasse has been reached include "the parties' bargaining history, the good faith of the parties in negotiations, the length of negotiations, the importance of the issue or issues as to which there is a disagreement, [and] the contemporaneous understanding of the parties as to the state of negotiations . ."⁴⁵ In determining whether impasse has occurred, the Board looks to whether both parties believe that they are "at the end of their rope" and whether further bargaining would be futile.⁴⁶

Here, we agree with the Region that the Employer bargained to impasse by repeatedly conditioning agreement to a collective-bargaining agreement on the Union's acceptance of the Employer's producer proposals. A review of the overall course of conduct shows that the Employer made any agreement contingent on the June 16 version of the proposals, and that the Union rejected those proposals and made plain that it would not agree to a contract containing the proposals.

This came in a context in which the Employer, from the outset, not only informed the Union that it wanted the producers out of the unit, but characterized the proposals as "vital to the success of WABC-TV," and said, "There will be fewer people represented at ABC-TV -- our competition has it," and that the Employer was "not going forward without being on a level playing field with our competitors . . [U]nless we find a way for these folks to have a managerial role, we can't go forward." When the Union asked, "What does that mean for this contract . . . What should the contract say and how do we do it?" an Employer representative responded, "You must agree to it," while another answered, "This proposal is not going away," Producers must come out of the unit. It's not going away."

⁴⁴ Eads Motors Eastern Air Devices, Inc., 346 NLRB No. 93, slip op. at 4 (2006) (quoting Hi-Way Billboards, Inc., 206 NLRB 22, 23 (1973), enf. denied on other grounds, 500 F.2d 181 (5th Cir. 1974)).

 $^{^{45}}$ Taft Broadcasting Co., 163 NLRB at 478.

⁴⁶ Grinnell Fire Protection Systems Co., 328 NLRB 585, 585 (1999), enfd. 236 F.3d 187 (4th Cir. 2000), cert. denied, 534 U.S. 818 (2001); AMF Bowling Co., 314 NLRB 969, 978 (1994) (quoting PRC Recording Co., 280 NLRB 615, 635 (1986), enfd. 836 F.2d 289 (7th Cir. 1987)), enf. denied, 63 F.3d 1293 (4th Cir. 1995).

In April 2006, the Union stated that the parties could reach a contract that day, but for the producer issue, which the Union characterized as "the big problem for the moment. You understand by now that that's a non-mandatory subject of bargaining. We tried to bargain with you on that. We don't feel that we have any obligation to bargain. And you can't ask us to put that in the contract if we don't want to do that. We ask you to take this off the table." The Employer responded that removing the proposals would be very difficult. The Union again stated that the proposals were nonmandatory and asked the Employer to "take it off the table and let's do a deal. In that context we are near the end. That's where we are. But we still have that ugly thing in the center of the table . . ." The Employer stated that it thought the producer proposal was important; the representative said he "could not conceive of a circumstance where that might come off the table . . . " He suggested that "it would take some extraordinary proposal from you t[o] counterbalance that proposal. But . . . sitting here today I can't see it."

The Union representative said to the Employer, "You have tried, you have stood on your head, but what you cannot do is make this a mandatory subject of bargaining. You tried to persuade us. You failed. We reject it. Now you have to take it off the table. Take it off the table and then there's no insult . . . You can't do it."

After the Employer presented the revised producer proposals at issue in the instant cases, the Employer argued to the Union that "it is imperative" that Sideletter G be amended to specifically exclude from the unit eight positions. When the Union representative stated that the proposal was still permissive and refused to negotiate over it, an Employer representative said that it was hard to imagine how the proposal would come off the table. The Union representative reiterated that the Union would not negotiate the matter. At the end of the session, the Employer stated that there would be no deal unless the Union accepted the producer proposals.

On October 4, the parties met again. At that meeting, the Employer presented a document entitled "Company's Last, Best and Final Package Proposal," which included the June 16 version of the producer proposals.

On October 20, the Union made new counterproposals. Included was a proposal intended to address the Employer's stated concern underlying its producer proposals, quality or "ownership" of the programs. The proposal would add a sideletter that would require news writers/producers to work with management to resolve performance issues as to

unit employees working on their particular shows and subject news writers/producers to discipline if they did not support management as described. The proposal would also establish a joint committee on producers.

The Employer again presented its October 4 proposals; there were no changes as to the producer proposals. At the end of the session, the Employer representative stated that the Union had the Employer's last, best, and final offer.

On November 29, the parties met in the presence of a mediator. The Union presented a newly revised comprehensive Union proposal, which included new compromises. The Employer representative informed the Union that the Employer had made its final offer. Later in the session, the Union stated that the parties could reach agreement that day if the Employer would withdraw the producer proposals. The mediator asked the parties whether, if they "dealt with the producers" they would have an agreement, to which the Union representative responded, "Certainly." The Employer representative said that they could have a deal, but that the agreement would be that which the Employer had presented on October 20. The Union representative reiterated that the Union was prepared to bargain, but the Employer representative answered, "Bargaining today was futile because you refuse to accept our final proposal. After two years of bargaining you didn't agree to one thing. We're done. Out of here." The parties have not bargained since that date.

Thus, the Employer's representative repeatedly said that the Employer would not withdraw the proposals, and that there would not be any agreement without the Union's acceptance of those proposals. The Employer's October 4 and 20 offers, both termed the Employer's final offer, included the proposals. When the Employer said it was through bargaining on November 29, its final offer included the producer proposals.

Although the Employer continued to insist on the proposals, by late October 2005, the Employer knew that the Union viewed the initial version of the producer proposals as permissive bargaining subjects, and from April 6 through the end of bargaining, the Employer knew that the Union would not bargain over either version of the proposals. Neither party's position changed with the June 16 version of the proposals.

Further, the Union repeatedly told the Employer, beginning on April 6, that the parties could reach a deal once the Employer withdrew the producer proposals. Indeed, at the meeting held November 29, after a federal mediator

asked both parties' representatives if the issue preventing the parties from reaching agreement was the producer proposals, the Union representative said yes, and the Employer representative said that the only deal available was the October 20 one, which included the producer proposals. Although the Union made substantial changes with its own November 29, 2006, proposals, 47 the Employer refused to make any more changes. Based on this history, we agree with the Region that the producer proposals were a substantial cause of the parties' reaching impasse.

The Employer contends that merely because impasse occurred while the parties were apart on the producer proposals does not mean that the producer proposals caused the impasse. ⁴⁸ It claims that the producer proposals were not the cause of the impasse. Here, however, the evidence is clear that the Employer made agreement on the producer proposals a "prerequisite or condition of agreement." ⁴⁹ The Employer repeatedly told the Union that there would be no agreement that did not include those proposals, including the new version. ⁵⁰

For this reason, <u>ACF Industries</u>, <u>LLC</u>, 51 cited by the Employer, is inapposite. In that case, the Board explained that the General Counsel and the union failed to

⁴⁷ The Union had, among other items, previously accepted portions of the Employer's proposals on seniority lists, made counteroffers on expanding the number of managers who would be permitted to write, and made counterproposals close to the Employer's proposal on acting editor fees. At the time that the Employer declared that further bargaining would be futile, the Union had made a counterproposal on temporary employees that accepted almost every aspect of the Employer's proposal, and the parties were not far apart as to the economic terms for temporary employees. Similarly, the Union had accepted nearly the entire Employer proposal on the workday at Network Radio. Thus, the Employer's contention that the Union did not agree to a single Employer proposal is inaccurate.

⁴⁸ See <u>Detroit Newspapers</u>, 327 NLRB at 800.

⁴⁹ Taft Broadcasting, 274 NLRB at 261.

⁵⁰ <u>Greensburg Coca-Cola Bottling Co.</u>, 311 NLRB at 1023 (employer insisted to impasse on permissive unit scope proposal; union repeatedly opposed the proposal, but employer refused to back down).

⁵¹ 347 NLRB No. 99 (2006).

demonstrate that the employer's insistence on a permissive proposal contributed to the impasse "in any discernible way."52 In the present case, in contrast, the Employer's producer proposals have been a primary source of conflict throughout the negotiations, and that conflict continued with the revised version of the proposals. The Employer repeatedly stated that there would not be any agreement without the proposals, and the Union stated that it would not bargain over them at all. Thus, the Employer's firm stance that the permissive subjects had to be in the agreement, and the Union's firm opposition to any agreement with those proposals together show that there was "no realistic possibility that continuation of discussion at that time would have been fruitful,"53 and that the parties had exhausted all areas of negotiation. 54 Therefore, we agree with the Region that the Employer unlawfully insisted to impasse on these permissive subjects of bargaining.

II. The Employer Did Not Unlawfully Refuse to Provide the Requested Information

We further conclude that the Employer did not unlawfully refuse to supply the Union with the requested information at issue because the information the Union sought related solely to the permissive producer proposals. The Union requested the personal service agreements of non-unit producers who worked for the Employer in Los Angeles, San Francisco, and Chicago so that it might evaluate the Employer's proposals that would remove the news writers/producers from the unit, permitting the Employer to set their pay through personal service agreements.

The "duty to furnish information stems from the underlying statutory obligation imposed on employers and unions to bargain in good faith with respect to mandatory subjects." 55 "Information concerning wage rates, job descriptions, and other information pertaining to employees

 $^{^{52}}$ Id., 347 NLRB No. 99, slip op. at 4.

 $^{^{53}}$ AFTRA v. NLRB, 395 F.2d at 628.

⁵⁴ Cf. Larsdale, Inc., 310 NLRB 1317, 1319 (1993) (premature impasse declared when union offered concessions that showed that the employer was "not justified in concluding that negotiations were at impasse simply because the Union's concessions were not more comprehensive or sufficiently generous").

⁵⁵ <u>Pieper Electric, Inc.</u>, 339 NLRB 1232, 1232 (2003).

within the bargaining unit is presumptively relevant.⁵⁶ As to information sought concerning non-bargaining unit employees, the Union must show that it is relevant to its representational duties as to the bargaining unit.⁵⁷ In particular, an information request as to non-unit wage data may be relevant if the request relates to a mandatory subject of bargaining.⁵⁸ There is no duty to furnish information that is relevant to a permissive subject.⁵⁹

Here, because the Employer's producer proposals themselves constituted permissive subjects of bargaining, the Employer had no duty to furnish the requested information. Although an employer may be under a duty to supply requested information regarding permissive subjects in certain circumstances, that duty arises only if the requested information furthers the union in its efforts to bargain over a mandatory subject. Thus, even if the Union chose to discuss the permissive producer proposals, the Employer still was under no legal obligation to supply the information because "parties do not have the power to alter this result merely by reaching agreement on the terms of a non-mandatory subject." 60 In sum, because the Union's

⁵⁶ Curtiss-Wright Corp., 145 NLRB 152, 156-157 (1963), enfd. 347 F.2d 61 (3d Cir. 1965).

^{57 &}lt;u>Adams Insulation Co.</u>, 219 NLRB 211, 214 (1975); <u>Curtiss-Wright Corp.</u>, 145 NLRB at 156-157.

⁵⁸ See Caldwell Mfg., 346 NLRB No. 100 (2006) (employer unlawfully refused to supply requested information; union showed the relevance of non-unit employees' wage rates); DuPont v. NLRB, 744 F.2d 536 (6th Cir. 1984) (employer unlawfully refused to supply information; relevance shown as to non-unit wage rates when information would aid union in bargaining effectively as to wages). See also Clear Channel, 347 NLRB No. 47 (2006); Jaggars-Chiles-Stovall, Inc., 249 NLRB 697, 700-701 (1980), enfd. 639 F.2d 1344 (5th Cir. 1981) (earnings information as to non-unit employees relevant to mandatory subject of bargaining).

⁵⁹ <u>Pieper Electric, Inc.</u>, 339 NLRB at 1236 (employer under no duty to provide information that related to both a collective-bargaining agreement provision and an employer's employee stock purchase plan when both the contractual provision and the plan constituted permissive subjects of bargaining).

^{60 &}lt;u>Ibid.</u> See <u>SEIU Local 535 (North Bay Center)</u>, 287 NLRB 1223, 1223 (1998) ("To violate the Act, a refusal to supply information must . . . pertain to a bargaining subject

information request related to the permissive subject of the producer proposals, this aspect of the charge should be dismissed, absent withdrawal. 61

III. The Employer Did Not Engage in Surface Bargaining.

Finally, we agree with the Region that the Employer did not engage in surface bargaining because the Employer's overall course of bargaining, viewed in its totality, did not manifest an intent to avoid an agreement with the Union. Section 8(d) of the Act requires "the employer and the representative of its employees to bargain with each other in good faith with respect to wages, hours, and other terms and conditions of employment . . . "62 Accordingly, parties in collective-bargaining have a duty to "enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement . . $.^{"63}$ As the Supreme Court has observed, "Collective bargaining . . . is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract."64 Determining where "hard bargaining ends and obstructionist intransiqence begins" requires a review of the entire course of bargaining. 65 Whether a party's conduct constitutes good faith bargaining involves

categorized as a mandatory one"), enfd. 905 F.2d 476 (D.C. Cir. 1990).

⁶¹ As we conclude that the Employer was not required to supply the requested information in any case, we therefore need not address the Employer's contentions that it has a valid confidentiality concern as to the information or that it bargained in good faith over an accommodation of that asserted confidentiality concern.

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 209-210 (1964) (citing NLRB v. Borg-Warner Corp., 356 U.S at 349).

 $^{^{63}}$ NLRB v. Herman Sausage Co., 275 F.2d 229, 231 (5th Cir. 1960).

⁶⁴ NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 485, 45 LRRM 2704 (1960). Accord Glomac Plastics, Inc. v. NLRB, 592 F.2d 94, 97-98 (2d Cir. 1979).

⁶⁵ NLRB v. Big Three Indus., Inc., 497 F.2d 43, 47 (5th Cir. 1974).

considering the overall conduct and the totality of the circumstances in which bargaining occurred. 66

In the instant cases, a review of the overall conduct shows that the Employer did not engage in surface bargaining. The Employer met regularly with the Union and showed an interest in reaching an agreement by agreeing to some Union proposals, withdrawing or modifying some of its own proposals, and making new proposals. 67 For example, the Employer modified a wage proposal and modified proposals concerning temporary employees and graphics work and withdrew a proposal to allow more flexibility in terms of layoffs. The Employer's willingness to make concessions evinces an intent to reach agreement; it made "some reasonable effort in some direction to compose his differences with the union."68 For example, the Employer modified a wage proposal and modified proposals concerning temporary employees and graphics work. The Employer also withdrew some of its proposals, including a proposal to allow more flexibility in terms of layoffs. The Employer did not refuse to meet, did not attempt to bypass the Union, and did not withdraw agreed-upon provisions. Moreover, the Employer did not make unlawful unilateral changes.

Although the Employer unlawfully insisted to impasse on a permissive subject, that alone here is not sufficient to establish an unlawful course of surface bargaining. 69 Its consistent pursuit of a change in the unit scope did not manifest a pattern of conduct that shows an intent not to reach any agreement. In sum, in considering the totality of the circumstances, we agree with the Region that the Employer did not engage in unlawful surface bargaining.

⁶⁶ Continental Ins. Co. v NLRB, 495 F.2d 44, 48 (2d Cir. 1974). Accord Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984).

⁶⁷ See A.H. Belo Corp. v. NLRB, 411 F.2d 959, 968 (5th Cir. 1969); Exchange Parts Co., 139 NLRB 710, 713-714 (1962), enfd. 339 F.2d 829, 832-833 (5th Cir. 1965).

⁶⁸ NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 135 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

⁶⁹ Cf. <u>Grosvenor Resort</u>, 336 NLRB at 615-617 (employer's insistence to impasse on permissive subject was part of overall pattern of conduct that evinced an intent not to reach an agreement).

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer unlawfully insisted to impasse on permissive subjects of bargaining. The Region should dismiss, absent withdrawal, the allegations that the Employer unlawfully refused to supply requested information and unlawfully engaged in surface bargaining.

B.J.K.